

## NATIONAL SECURITY

Jones Nomination - 2

Services Committee approved the nomination June 16 by a 16-1 vote, with Humphrey casting the lone ballot against Jones. He and Helms opposed Jones because of Jones' support for Carter's Panama Canal and arms control (SALT II) treaties and the decision to cancel the B-1 bomber.

However, Helms said in a June 4 newspaper interview he would not "raise any ruckus" about the nomination because "Gen. Jones has agreed to tender his resignation in January if Gov. [Ronald] Reagan is elected."

At his hearing, Jones denied striking any such bargain. "I categorically deny that there was any arrangement made, or any deal," he said.

Jones acknowledged that he and Sen. John W. Warner, R-Va., had discussed the law, which said the chairman of the Joint Chiefs served "at the pleasure of the president."

He also agreed with Warner when the Virginia senator recalled that Jones said he would go "gracefully" if asked by the president to resign.

But Jones said he had no intention of submitting his resignation to a new president — as political appointees routinely do when an administration changes — because it would politicize his office and set a bad precedent.

All he promised Warner, Jones said, was that "I'm not going to kick and scream and go to court." ■

## U.S. Intelligence Agents

Despite widespread congressional support, legislation making it a crime to expose U.S. secret agents died at the end of the 96th Congress.

Enraged by attacks on U.S. intelligence agents in Jamaica after their presence was publicized by a CIA critic, the House and Senate Intelligence and Judiciary committees moved swiftly on bills (S 2216, HR 5615) to outlaw such disclosures.

However the committees' efforts, which came during the summer, were not finished in time to prevent the bills from being buried in the end-of-session legislative logjam. Neither chamber brought the legislation to the floor for a vote.

The so-called "names of agents" measures were aimed at punishing CIA critics who made it a practice to publicly identify American undercover agents. Sponsors of the bills said that at least one CIA agent was killed, and others endangered, as a result of the exposures.

Civil libertarians, law professors and newspaper groups opposed the legislation, saying it would abridge the First Amendment. They also said it would stifle critical reporting of the CIA and other spy agencies.

The most controversial provision of the legislation would have made it a crime to uncover a U.S. secret agent even if the agent's name was learned from public sources.

The CIA and FBI strongly favored the legislation, which both agencies maintained was needed to protect undercover operatives and thus allow the United States to conduct effective intelligence and counterintelligence programs.

Because of disputes surrounding the bills — the Senate Judiciary Committee in particular had added amendments that would have ensured a floor fight — congressional leaders decided not to act on the legislation in 1980. The measures were expected to reappear in the 97th Congress.

## Background

Advocates of a comprehensive charter for the U.S. intelligence agencies had intended to delay consideration of the so-called "names-of-agents" legislation until 1981. Unable to get a complex charter through the 96th Congress, charter proponents had planned to use the promise of the popular agents' protection bill as leverage to get a charter through the 97th Congress. (*Intelligence charter legislation*, p. 66)

But on July 2, CIA antagonist Louis Wolf, editor of the Washington-based *Covert Action Information Bulletin*, held a news conference in Jamaica and identified 15 Americans as CIA agents. Wolf said the 15 were engaged in a "destabilization" campaign directed against Jamaica.

Wolf and his co-editors, William H. Schaap and Ellen Ray, announced that they did not use illicit sources to discover the identities of the CIA agents, but rather deduced them from government publications such as lists of Foreign Service officers, a cover often used by agents.

Two days later, the home of the CIA station chief in that island nation was spattered with gunfire. Within days of that incident, gunshots were fired at armed guards outside the home of another man on Wolf's list.

Sponsors of the legislation openly acknowledged their desire to enact a bill that could be used to punish Wolf. "I want to put him away," announced John H. Chafee, R-R.I., sponsor of S 2216. Said Senate Intelligence Committee Chairman Birch Bayh, D-Ind.: "I want to nail him."

HR 5615 and S 2216 were referred to both the Intelligence and Judiciary committees of the House and Senate.

## Intelligence Committees

### House Bill

The House Intelligence Committee approved HR 5615 on July 25 by voice vote, and the committee report on the bill was filed Aug. 1 (H Rept 96-1219, Part I).

HR 5615 was introduced by House Intelligence Committee Chairman Edward P. Boland, D-Mass., who said a disclosure such as Wolf's constituted "a pernicious act that serves no useful purpose whatsoever."

There was no disagreement from committee members on that point. However, two amendments were proposed.

Robert McClory, R-Ill., moved to raise the penalty for violations of the third provision of the bill — the penalty for disclosure of agents by persons not having access to government secrets — from one year in prison and/or a fine of up to \$5,000 to three years and/or \$15,000. The panel approved this by voice vote.

Then Les Aspin, D-Wis., offered an amendment to provide that a defendant indicted under the new law could avoid the charge if he could prove the information he used to identify a covert agent came from unclassified sources.

"Criminals are not the people who use unclassified information," Aspin said in arguing for his amendment, which he said would protect legitimate journalists who might be charged under the law for writing stories about CIA mistakes or misdeeds.

But other members of the committee scorned Aspin's suggestion. "It'd make this piece of legislation look ridiculous," said McClory.

Aspin's amendment was rejected by voice vote.

The bill then was ordered reported.

**U.S. Intelligence Agents - 2****MAJOR CONGRESSIONAL ACTION****Senate Bill**

The Senate Intelligence Committee approved the companion bill (S 2216) July 29 and reported it Aug. 13 (S Rept 96-896).

The Senate version, which was almost identical to the House bill, was sponsored by Chafee as a substitute for a broader measure introduced earlier in the year by Daniel Patrick Moynihan, D-N.Y.

Unlike its House counterpart, the Senate panel debated at length the bill's penalty against disclosure by private persons. Members worried whether it would be an abridgment of the First Amendment and thus unconstitutional, and whether its wording would allow defendants to escape conviction.

"We're all outraged by what has happened in Jamaica. We're all outraged by [CIA critic Philip] Agee," said Joseph R. Biden Jr., D-Del. "But [will] our effort to get to them, which we should, violate the Constitution?"

Biden and Moynihan pointed out that there would be nothing illegal about harboring the political wish to abolish the CIA, or about engaging in legitimate political activities to accomplish that goal.

Kenneth C. Bass III, counsel for the government's intelligence policy in the Justice Department, was present at the markup. Asked by the committee to comment, he said "the First Amendment is not absolute," arguing that someone who exposed a covert agent "is speaking the same kind of speech as a person who shouts fire in a crowded theater: speech that endangers public safety and individual lives." Laws forbidding such speech have been ruled constitutional.

The committee also debated at length whether the wording of the bill offered loopholes to potential defendants by requiring the government to prove an intent to harm U.S. intelligence operations.

That discussion occurred when Bayh offered an amendment to change the emphasis of the provision relating to the First Amendment by making disclosures by private citizens a crime only if they were "intended to impair or impede" U.S. intelligence "by identifying and exposing covert agents [and] with reason to believe that such disclosure would impair or impede" U.S. intelligence activities.

Bayh said his amendment would protect "normal" journalism by emphasizing the intent to harm U.S. intelligence.

But the Justice Department's Bass told the committee that Bayh's wording would force the government to prove a defendant's "subjective intent" — his ultimate goal — rather than simply to establish the consequences of the disclosure. This would make it difficult to get convictions under the new law, he said.

Henry M. Jackson, D-Wash., agreed. "When you get into specific intent, you've got real problems," Jackson said.

Bass said Chafee's wording would be more likely to result in convictions since it would rely on "objective intent," which he defined as the "natural consequences" of disclosing an agent's identity, as opposed to a defendant's motive.

Bayh argued that it "wouldn't be hard to prove" that Wolf and Agee intended to impair U.S. intelligence. But Chafee disagreed, saying Wolf could argue that his motive was to improve U.S. intelligence activities by blocking clandestine operations, which he contended were misguided.

The committee rejected Bayh's amendment by a 3-9 vote, with Bayh, Walter "Dee" Huddleston, D-Ky., and Daniel K. Inouye, D-Hawaii, voting for it.

The panel then adopted by voice vote a second amendment by Bayh to exempt covert agents who voluntarily identified themselves, as long as their doing so did not reveal the identities of other agents.

Another phrase that worried the committee members was wording requiring that, to warrant a conviction, a disclosure would have to be part of "a pattern of activities."

Malcolm Wallop, R-Wyo., said such language might mean that someone could expose one or more covert agents without breaking the law, since "a pattern of activities" might be interpreted to mean a series of disclosures.

The committee left that issue for the courts to resolve. But to better define the terms, it adopted unanimously language by Huddleston defining "a pattern of activities" as "a series of acts with a common purpose or objective."

After voting 11-0 in favor of Chafee's substitute, the committee approved S 2216 by voice vote.

**Bills Compared**

As reported by the House and Senate Intelligence committees, HR 5615 and S 2216 were identical on two of three key provisions. These:

- Made it a crime punishable by a prison term of up to 10 years and a fine of up to \$50,000 for anyone having authorized access to the names of covert agents to disclose an agent's identity to persons not authorized to have it.

- Made it a crime punishable by a prison term of up to five years and/or a fine of up to \$25,000 for anyone with authorized access to classified information — whether or not that included the identities of covert agents — to disclose an agent's identity gained from information resulting from access to government secrets.

The bills differed slightly in their wording on the third provision, relating to disclosures by private persons, but provided the same penalty for violating it: up to five years in prison and a fine of up to \$15,000.

The House version made disclosures such as those by Wolf a crime if they were committed "in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States."

The Senate version made such disclosures punishable if committed "in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States."

Both bills allowed the government to prosecute disclosures committed outside the United States "if the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence."

The bills also established certain protections against charges brought under the new law:

- A defendant could not be convicted if the government had "publicly acknowledged or revealed" its relationship with the agent whose identity had been disclosed.

- Only the person disclosing an agent's identity could be charged; others could not be charged with conspiracy to disclose an agent's identity. This provision would not have applied to a person engaging "in the course of a pattern of activities" who had "reason to believe" those activities would "impair or impede" U.S. intelligence activities.

## NATIONAL SECURITY

U.S. Intelligence Agents - 3

- The act of disclosing an agent's identity would not, by itself, have constituted proof of an effort to impair or impede U.S. intelligence activities.

- The bills did not consider it to be an offense to identify an agent to the House or Senate Intelligence committees.

## Judiciary Committees

### House Bill

The House Judiciary Committee approved HR 5615 by a 21-8 vote Sept. 3 and reported the bill Sept. 4 (H Rept 96-1219, Part II).

The committee rejected by a two-to-one margin the position of the Civil and Constitutional Rights Subcommittee that HR 5615 would deprive private citizens, especially journalists, of their First Amendment rights.

Liberal Democrats were defeated in their attempt to limit the bill's scope to persons with access to government secrets. The subcommittee had voted Aug. 26 to delete the section of the bill applying penalties even if the defendant did not have authorized access to classified information and had used only public information to identify an agent. It also voted to remove from the bill's definition of a covert agent FBI agents and informants operating in the United States.

But the full committee, with the backing of all 11 Republicans, adamantly refused to drop the criminal penalties for private citizens. The committee rejected the change by a 9-18 vote. It also rejected the deletion from the bill of FBI employees.

**Constitutional Question.** When the House Judiciary Committee took up HR 5615, subcommittee Chairman Don Edwards, D-Calif., said none of his panel's members "agree with what these people [Wolf, Schaap and Ray] are doing." But he added that "a majority of the subcommittee can't see how a constitutional clause can be written" that would stop private citizens from exposing agents' identities.

Edwards and subcommittee member Robert F. Drinan, D-Mass., said they wanted to limit the prohibition on disclosures to those made by persons with existing or past access to classified information. This, they argued, would avoid any collision with the First Amendment.

"It's perfectly constitutional for the CIA bill to prosecute the Philip Agees of the world," Drinan said, referring to the former CIA employee who made an international reputation by naming covert agents.

Drinan said the provision the subcommittee wished to delete was written merely as "the result of the hysteria created by the July incident in Jamaica."

Drinan said the "real remedy" for the danger faced by CIA agents through possible exposure lay in a subcommittee proposal to require the president to "provide these people with better cover."

On the other hand, committee member Henry J. Hyde, R-Ill., referring to the editors of *Covert Action*, argued that enemies of the CIA "should not be permitted to hide behind the First Amendment."

Hyde contended that whether the law would be ruled constitutional by the courts depended on "the nature of the information" disclosed rather than the status of the persons who disclosed it.

Robert McClory, Ill., the committee's ranking Republican and a member of the Intelligence Committee, also criticized the subcommittee's substitute. He said CIA officials had told him the purpose of the legislation would be destroyed by the subcommittee's version.

Harold L. Volkmer, Mo., the only Democrat on the subcommittee who opposed the substitute, said he felt that if even the committee bill were unconstitutional "the question should be resolved by the courts and not by us."

**Legitimate Journalists.** Edwards said another reason for amending the original bill was that it might be used to prosecute "legitimate" journalists.

He said the private citizens provision might apply even to such publications as *The Washington Post* if, for example, the newspaper was critical of U.S. policy in Chile and exposed misdeeds by undercover CIA agents in that country. It could be argued in such cases, Edwards said, that the Post's motive was to "impair or impede the foreign intelligence activities of the United States."

Romano L. Mazzoli, D-Ky., a member of both the Judiciary and Intelligence committees, said there was no basis to believe the bill would affect such journalists. "You can effectively point out defects in foreign policy without naming names [of agents]," Mazzoli argued.

Supporters of the original bill said legitimate journalism would be protected because of the requirement that a prosecutor prove a defendant's "intent to impair or impede" U.S. intelligence operations.

But John F. Seiberling, D-Ohio, argued that this language still might be used against journalists, and Drinan said he thought a defendant's intent would be difficult to prove in court, anyway.

John M. Ashbrook, R-Ohio, conceded that "it's almost impossible to prove intent." But Ashbrook said he hoped a House-Senate conference would adopt the "tougher language" of the Senate bill, which required only that the prosecution prove a defendant identified an agent intentionally and "with reason to believe" the act would impair or impede U.S. intelligence.

**FBI Agents.** Edwards said his subcommittee wanted to remove the bill's coverage of FBI agents and informants because "no evidence has ever been presented [in congressional hearings] that FBI informants or covert agents have been identified." But Hyde argued that Congress should not "have to wait for a bloody body to give them the protection they deserve."

**Amendments Rejected.** After losing the key vote on adoption of the substitute, subcommittee members offered two amendments with the intent of trying to soften the bill's impact. But the Republican members, joined by a majority of the panel's Democrats, protested that the subcommittee was trying to "gut" the bill and easily succeeded in defeating the amendments.

By an 8-21 vote, the committee rejected an amendment by Seiberling to allow a defendant charged with exposing an agent to escape conviction if the agent's identity was learned from "other than classified sources."

The House Intelligence Committee had rejected the same amendment when it was offered by Les Aspin, D-Wis. As reported by the committees, HR 5615 provided a more limited defense, allowing a defendant to escape conviction if the government "publicly acknowledged or revealed" its relationship with the agent identified.

The Judiciary committee also rejected, by a 7-21 vote, an amendment by Drinan to limit the bill's protection to agents and informants operating outside the United States.

### Senate Bill

The Senate Judiciary Committee reported S 2216 Sept. 24 (S Rept 96-990).

**U.S. Intelligence Agents - 4****MAJOR CONGRESSIONAL ACTION**

The committee made the following changes in the Intelligence Committee version:

- By a vote of 8-6, it added language to allow a private citizen who exposed an agent to escape conviction if the disclosure was "an integral part of another activity such as news reporting of intelligence failures or abuses, academic study of government policies and programs, enforcement by a private organization of its internal rules and regulations, or other activity protected by the First Amendment. . . ."

- By a vote of 10-6, it deleted the phrase "intended to identify and expose covert agents" and replaced it with language requiring that a criminal disclosure be part of a pattern "undertaken for the purpose of uncovering the identities of covert agents and exposing such identities."

- By a vote of 7-6, it barred U.S. intelligence agencies from disguising their agents as employees of the Peace Corps or the Agency for International Development.

- By voice vote, it agreed to allow court challenges to the bill's constitutionality to be expedited.

Edward M. Kennedy, D-Mass., inserted additional views in the Judiciary Committee report saying the panel's amendments represented "a reasonable and defensible effort to meet constitutional objections without fatally compromising the legitimate purposes of the measure."

But Republican committee members Chafee, Alan K. Simpson, of Wyoming, Strom Thurmond of South Carolina, Orrin G. Hatch of Utah and Robert Dole of Kansas added dissenting views, protesting that the changes would "gut" the bill.

## Personnel Management Act

Congress Nov. 21 cleared legislation (S 1918 — PL 96-513), the Defense Officer Personnel Management Act (DOPMA), revising the laws governing military officer promotion and retirement practices.

The bill had been delayed for more than a year because of the Senate Armed Services Committee's insistence on making deep cuts in the number of officers promoted to high rank.

The bill was signed by President Carter on Dec. 12.

Lead by Sen. Sam Nunn, D-Ga., the committee had insisted on reducing the number of top military promotions by 20-30 percent. But a compromise worked out with the House Armed Services Committee imposed a much smaller reduction on the number of officers promoted to major and colonel, thus coming closer to the policy favored by the Pentagon and the House Armed Services Committee.

The Senate position prevailed on two issues in the final version of S 1918:

- The "up-or-out" policy, which required officers to leave the service if they were not promoted to higher rank within a certain period, was made more flexible.

- Generals and admirals were required to serve a minimum of three years in their rank, as a rule, before they could retire at that rank.

### Legislative History

As originally proposed by the Ford administration in 1975 and then supported by the Carter administration, DOPMA essentially was a housekeeping measure that removed various arbitrary distinctions in the rules for retention, promotion and retirement of military officers.

But when Senate Armed Services took up the bill in 1979, Manpower Subcommittee Chairman Nunn rewrote it to substantially reduce — by 20 to 30 percent over a 10-year period — the total number of majors, lieutenant colonels and colonels that could serve in the armed service and to loosen the "up-or-out" policy. Too many officers were being promoted into senior positions, Nunn argued. As a result, he said, officers did not remain in one job long enough to master it. This also meant that officers reaching the senior ranks had too little experience.

**Senate Action.** The full committee approved Nunn's recommendation and reported S 1918 on Oct. 22, 1979 (S Rept 96-375). In the report, the committee said that reducing the number of senior officers would increase the services' combat effectiveness. It would ensure that senior officers would have a much greater chance of holding a command assignment long enough to gain useful experience.

The committee pointed out that in 1968 there had been 7.5 enlisted men to every officer, while in 1979 the ratio had declined to 6.5 to one. The average rank of officers as well as the average pay for each rank had increased, it said, but the average length of time officers spent in military service had dropped substantially.

The Senate version of DOPMA was passed unanimously, 87-0, on Nov. 30, 1979, over vigorous Pentagon opposition. Some Armed Services members, including Strom Thurmond, R-S.C., and Gordon J. Humphrey, R-N.H., attacked the proposed cutback in high ranking positions. They cited the Pentagon's argument that Nunn's bill would slow the rate at which officers could expect to be promoted, and thus it would exacerbate the services' already severe difficulty in retaining experienced officers. (*Vote 436, 1979 Almanac p. 73-S*)

The senators urged the House to fight the reductions.

**House/Final Action.** In the House, military overseers had decided in 1979 to wait until the Senate acted. In the last two Congresses, the House had approved basically the bill requested by the Pentagon. At an April 29, 1980, hearing, the House Armed Services Compensation Subcommittee asked for the Pentagon's comments on the Senate-passed Nunn version.

"Flawed," "unfounded," "deleterious," "speculative" and "precipitous" were among the words chosen to describe the bill by Robin B. Pirie Jr., the Defense Department's manpower chief. Pirie told subcommittee Chairman Bill Nichols, D-Ala., he would prefer that the legislation be rejected than to have the Senate version enacted.

The bill, Pirie said, would reduce by 37 percent the chances of an officer being promoted, thus increasing the number of officers leaving service to seek civilian careers. The Senate grade tables, he said, "rest on speculative assumptions about retention behavior that in our judgment are seriously in error. The consequences of such an error could easily backfire causing an experience drain that would take years to overcome."

While this was not the first time the Pentagon had scrapped with Nunn, it was one of the most direct challenges made by the Defense Department to his philosophy.

But later in 1980, committee staffs of both Armed Services committees worked out a compromise version. The House Armed Services Committee reported the compromise version (H Rept 96-1462) on Nov. 13, 1980, and the bill was passed by the House Nov. 17 by voice vote. The Senate agreed to the revised bill on Nov. 21 by voice vote, completing congressional action.